Supreme Court, U. S.
FILED
JAN 22 1979
RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978 - 1153

NO. _____

JOHN ANGUS,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OF COUNSEL:

STEPHEN M. TAYLOR, ESQ.
3000 Town Center, Suite 3131
Southfield, MI 48075
(313) 358-3590

ROBERT EUGENE SMITH, ESQ.
1409 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 892-8890

*Attorney for Petitioner*

The Paul M. Harrod Company, Baltimore, Maryland 21234

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

NO. _____

JOHN ANGUS,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on October 18, 1978.

## OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is not yet reported; a copy is set forth in Appendix "A" hereto. A copy of the Order denying Rehearing on November 24, 1978 is set forth in Appendix "B" hereto. The Order of the Circuit Justice Stewart extending the time within which to file this Petition for Writ of Certiorari until January 23, 1979 is set forth in Appendix "C" hereto.

## JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 18, 1978. A Petition for Rehearing was timely filed and denied on November 24, 1978. On December 11, 1978, Mr. Justice Stewart granted an extension of time to and including January 23, 1979, within which to file this Petition. This Court's jurisdiction is invoked under Title 28, United States Code §1254 (1).

## QUESTIONS PRESENTED

1. Does the denial by the trial judge of an evidentiary hearing on Petitioner's Demand for Specific Performance under the *Santobello* (404 U.S. 257) rationale constitute a deprivation of Petitioner's rights to due process under the Fifth Amendment to the Constitution of the United States as well as also failing to promote the policy of this Court in the sound administration of justice?

2. Is Petitioner entitled to specific performance of his plea bargain contract, on due process grounds, where as here, heswas induced to enter a plea of "guilty" on the basis



of receiving probation if he were to act as an agent for the government in various "controlled substances" deals, or otherwise furnish evidence of ongoing criminal activity, State or Federal, as well as giving information on criminal activities of at least eighteen (18) other offenders, and where, as here, he substantially performed his part of the contractual understanding?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The pertinent provisions of the Fifth Amendment are:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

## STATEMENT

On October 22, 1975, in a 31 count superceding indictment, Petitioner and others were charged with knowingly, intentionally and unlawfully combining, conspiring, confederating and agreeing together with each other to commit the offense of possession with intent to distribute various quantities of heroin, a controlled substance, contrary to Title 21 United States Code Section 841 (a) (1), Title 21 United States Code Section 846 and Title 18 United States Code Section 2. Petitioner was arraigned on October 29, 1975.

On December 23, 1975, Petitioner and his counsel appeared before District Court Judge Phillip Pratt, Judge of the District Court, Eastern District of Michigan, Southern Division, and entered a plea of guilty to Count I of the superceding indictment, a violation of Title 21 United States Code

Section 841. Prior to that time and outside the presence of the Court, Petitioner entered into a plea agreement with the Assistant United States Attorney, representing the United States Government in said matter, that he (Petitioner) would act as an agent for the Government and furnish evidence of various "Class-A controlled substance" deals as well as other information as to other ongoing criminal activity that he became aware of and would fully cooperate with the Government in the matter pending before the Court, in return for which Petitioner would be given a probationary sentence upon his guilty plea. The perameters of the plea bargain were not made part of the record nor were they disclosed to the District Court at any time prior to the time the guilty plea was accepted. Following the guilty plea Petitioner was instructed by his counsel to fully cooperate with federal authorities. Petitioner was also directed by his counsel to make a statement concerning his knowledge of the criminal conspiracy to agents of the Federal Drug Enforcement Agency. Petitioner disclosed his knowledge of the conspiracy to federal authorities during a meeting on January 7, 1976.

Petitioner, with the assistance of newly acquired counsel, moved the District Court to withdraw the plea of guilty. A hearing was held June 16, 1976. During this hearing the Assistant United States Attorney informed the Court that there existed sufficient indications that Petitioner's guilty plea resulted from ineffective assistance of counsel. As a consequence of this determination the Government did not oppose the withdrawal of the guilty plea. At this juncture of the hearing defense counsel moved the Court to order the specific performance or an evidentiary hearing to determine if the alleged "plea agreement" had been breached.



In view of the Court's erroneous concept of the plea bargaining process and failing in his bid for an evidentiary hearing on the specific performance question, the Petitioner entered a second plea of guilty and was sentenced on November 10, 1977. He reserved the right by his plea to appeal the question herein preserved. On October 18, 1978, the Sixth Circuit Court of Appeals rejected Petitioner's claims and, on November 24, 1978 denied Petitioner's Application for Rehearing.

## REASONS FOR GRANTING THE WRIT

### I.

THE DENIAL BY THE TRIAL JUDGE OF AN EVIDENTIARY HEARING ON PETITIONER'S DEMAND FOR SPECIFIC PERFORMANCE UNDER THE SANTOBELLO (404 U.S. 257) RATIONALE CONSTITUTED A DEPRIVATION OF PETITIONER'S RIGHTS TO DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AS WELL AS ALSO FAILING TO PROMOTE THE POLICY OF THIS COURT IN THE SOUND ADMINISTRATION OF JUSTICE.

The Petitioner, John Angus, acting under the fixed impression that a plea bargain had been struck between himself and the government, at great peril to his life and limb undertook to secure for his government evidence of ongoing criminal activity including an "assassin for hire." Further, he gave statements implicating approximately seventeen (17) others in criminal activities involving primarily "controlled substances."

After considerable risk to his person and after great outlay of his personal monies as expenses, his government says "John Angus - You have no plea bargain - thanks for all your help!"

Special Agents of the Federal Bureau of Investigation as well as agents of the Drug Enforcement Agency greedily partook of John Angus' cooperation and assistance given by him in the sincere belief that he had struck a "bargain"; he had a contract.

The government says no deal was consummated. The Court says no hearing is required on your request for "specific performance."

John Angus asks this Court for his fundamental rights to due process under the *Fifth Amendment* to the *Constitution of the United States*.

This Court recently observed in the case of *Blackledge v. Allison*, 431 U.S. 63, at page 71, "[w]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concommittant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."

More recently this Court, in the case of *Bordenkircher vs. Hayes*, __ U.S. __ (1978) 54 L Ed 2d 604, stated:

> "The open acknowledgement of this previously clandestine practice has led this Court to recognize the importance of counsel during plea negotiations, Brady v. United States, 397 U.S. 742, 758, the need



for a public record indicating that a plea was knowingly and voluntarily made, Boykin v. Alabama, 395 U.S. 238, and the requirement that a prosecutor's plea bargaining promise must be kept, Santobello v. New York, 404 U.S. 257, 262." at pages 604-5.

Further,

"Plea bargaining flows from the 'mutuality of advantage' to defendants and prosecutors each with his own reasons for wanting to avoid trial . . . . Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any motion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process:

> 'By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges and thus by fear of the possibility of a greater penalty upon conviction after a trial. See ABA Standards Relating to Pleas of Guilty § 3.1 (1968); Note, Plea Bargaining and the Transformation of the Criminal Process, 90 Harv. L. Rev. 564 (1977) Cf. Brady v. United States, supra, 397 U.S. at 751, 25 L. Ed. 2d 747, 90 S.Ct. 1463; North Carolina v. Alford, 400 U.S. 25, 27 L. Ed 2d 162, 90 S.Ct. 160, 56 Ohio Ops 2d 85.' "

On May 31, 1976, then counsel for John Angus filed a Motion in the trial Court with respect to the plea bargain which he further amplified in a hearing before U.S. District Court Judge, Philip Pratt, at Detroit, Michigan on June 16, 1976, at page 3, where he stated:

> " . . . we nevertheless would at this time respectfully ask that the motion that is being made - - that is, the motion to withdraw the plea - - be considered by the Court as a motion to enforce an agreement; and we would ask that the hearing go forth under that motion, in place and stead of the motion to withdraw the plea."

The Court in denying any hearing on the demand for specific performance, and for an evidentiary hearing on the facts surrounding the alleged plea bargain inducement contract went on at page 5 to rule:

> "Insofar as the alleged promise is concerned and an attempt to enforce that promise, that would seem to me to be the type of promise contemplated by Rule 11, which is within the discretion of the Court anyway. So that would be an exercise of futility here."

The Court did strike the plea on the basis of the concession by the U.S. Attorney that he had an ineffective assistance of counsel at the time of the entry of the original plea in this matter. Counsel for John Angus at the hearing before Judge Pratt tried to get the Court to have a hearing on the plea bargain contract, and the Court refused to do so saying at page 6.



> "Well, I am not going to play games, Counsel. I am permitting your withdrawal of the plea. I don't see that there is a violation of any rights whatsoever; but, on the contrary, enforcing the right of the defendant here to go to trial if he wishes to do so."

A copy of the transcript referred to herein is Appendix "D".

The Court of Appeals at page 2 of its Opinion viewed the *Santobello* rationale as requiring an agreement that in essence was signed, sealed and delivered when it stated:

> "In, essence, Appellant seeks specific performance of a plea bargaining agreement which was never consummated."

We think that the Circuit Court has misconstrued the thrust of the *Santobello* case and its progency. The law appears to require no such strict standard.

Nonetheless, before the District Judge struck the plea of guilty on June 16, 1976, he should have afforded Petitioner and his counsel an evidentiary hearing on the question of whether there had been plea bargaining, what the bargain appeared to be, whether the Petitioner was thus induced to enter his plea, did he thereafter substantially perform in accordance with his understanding of the plea bargain, and were they thereafter estopped from denying the existence of the contract. The Court felt that since Rule 11 of the Federal Rules of Criminal Procedure had not been fully complied with, no consideration need be given to the facts surrounding the plea bargaining process. Since the Court struck the plea on the basis of ineffective assistance of Counsel, it refused to consider the specific performance factual issues.

Clearly the District Court was wrong, and in denying the evidentiary hearing deprived Petitioner of his rights to fundamental justice and due process under the *Fifth Amendment*.

In a case out of the Eighth Circuit, *United States of America v. Scharf*, 551 F.2d 1124, (1977) at page 1130 the Court rules in part as follows:

> " . . . we conclude that the order of the district court must be reversed and the cause remanded with directions to the district court to hold an evidentiary hearing, to determine what the terms of the plea bargain were, and whether the bargain was breached . . ."

Its rationale in ordering an evidentiary hearing on a disputed issue of fact is found earlier in its opinion where it states:

> "However, we cannot be so convinced from the record before us. Where a post-sentence motion for relief under Rule 32(d) presents an issue of fact, an adversary evidentiary hearing may be required to resolve the issue. United States v. Battle, 447 F.2d 950 (5th Cir. 1971); Meyer v. United States, 424 F.2d 1181 (8th Cir.), cert. denied, 400 U.S. 853, 91 S.Ct. 92, 27 L. Ed 2d 91 (1970); United States v. Mainer, 383 F. 2d 444 (3d Cir. 1966); 2 Wright, Federal Practice & Procedure, Criminal §539, p. 477."



The demand for hearing on John Angus' Motion for Specific Performance was denied. To John Angus, justice was denied. A hearing on the question of the plea bargain was constitutionally mandated. The Court denied the hearing. John Angus' due process rights were denied.

This Honorable Court should vacate and reverse with instructions to the trial Court to hold an appropriate hearing. Any such hearing is mandated by the rationale of *Blackledge v. Allison*, 431 U.S. 63, 52 L. Ed 2d 136, 97 S. Ct. 1621 (1977).

## II.

THE PETITIONER IS ENTITLED TO SPECIFIC PERFORMANCE OF HIS PLEA BARGAIN CONTRACT, ON DUE PROCESS GROUNDS, WHERE AS HERE, HE WAS INDUCED TO ENTER A PLEA OF "GUILTY" ON THE BASIS OF RECEIVING PROBATION IF HE WERE TO ACT AS AN AGENT FOR THE GOVERNMENT IN VARIOUS "CONTROLLED SUBSTANCE" DEALS, OR OTHERWISE FURNISH EVIDENCE OF ONGOING CRIMINAL ACTIVITY, STATE OR FEDERAL, AS WELL AS GIVING INFORMATION ON CRIMINAL ACTIVITIES OF AT LEAST EIGHTEEN (18) OTHER OFFENDERS, AND WHERE, AS HERE, HE SUBSTANTIALLY PERFORMED HIS PART OF THE CONTRACTUAL UNDERSTANDING.

That notwithstanding the fact that special agents of the Federal Bureau of Investigation and agents of the Drug Enforcement Administration readily worked with John Angus to glean from him and debrief him or his knowledge of various

criminal enterprises and the participants therein, knowing all too well that John Angus did so in full expectation of buying his freedom viz-a-viz a plea bargain, the government attorneys will contend that in the absence of a Rule 11 agreement, fully spread on the record, that any understanding that induced John Angus to enter a plea of guilty was a nullity and of no force and effect. We suggest that the government is equitably estopped from denying this plea bargain agreement and John Angus should be given specific performance, i.e. probation.

The Appellate Court also suggests by its Opinion that any plea bargain to be enforceable must be reduced to writing per Rule 11.

We feel that the Court of Appeals for the Sixth Circuit is in error.

Mr. Justice Douglas concurring in *Santobello v. New York*, 404 U.S. 257 at 267 states:

> "I join the opinion of the Court and favor a constitutional rule for this as well as for other pending or oncoming cases. Where the "plea bargain" is not kept by the prosecutor, the sentence must be vacated and the state court will decide in light of the circumstances of each case whether due process requires (a) that there be specific performance of the plea bargain or (b) that the defendant be given the option to go to the trial on the original charges. One alternative may do justice in one case, and the other in a different case. In choosing a remedy, however, a court ought to accord a defendant's preference considerable, if not controlling,



> weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State."

Mr. Justice Marshall, with Justice Brennan and Stewart concurring in *Santobello* at page 268 said:

> "When a prosecutor breaks the bargain, he undercuts the basis for the waiver of the constitutional rights implicit in the plea. This, it seems to me, provides the defendant ample justification for rescinding the plea.
>
> "Where a promise is "unfulfilled," Brady v. United States, 397 U.S. 742, 755, 25 L Ed 2d 747, 760, 90 S.Ct. 1463 (1970), specifically denies that the plea 'must stand.' Of course, where the prosecutor has broken the plea agreement, it may be appropriate to permit the defendant to enforce the plea bargain."

Further, in a footnote those Justices observed that the majority of the Court gives the right to choose the remedy for a broken plea bargain (i.e. withdrawal of plea, on specific performance) to the defendant.

> "Mr. Justice Douglas, although joining the Court's opinion (apparently because he thinks the remedy should be chosen by the state court), concludes that the state court 'ought to accord a defendant's preference considerable, if not controlling, weight.' Thus, a majority of the Court appears to believe that in cases like these, when the defendant seeks to vacate the plea, that relief should generally be granted."

See also:

"Note: Guilty Plea Bargaining Compromises by Prosecutors to Secure Guilty Pleas. 112 U. Pa. L. Rev. 865, 876 (1964).

"D. Newman, Conviction: The Determination of Guilt or Innocence without Trial, pg. 36, (1966)

Had Mr. Angus been afforded an evidentiary hearing he may have convinced the Court "that his plea was induced by an advantageous plea agreement that was violated, [and] *he may obtain the benefit of its terms*." (Emphasis supplied.)

*Blackledge v. Allison, supra*, at page 72

The Court in *Blackledge* was quick to recognize the realities of life when it struck upon the terminology of "induced" at page 72.

See *Marchibroda v. United States*, 368 U.S. 487 at pages 494-495, (1962).

The Federal Appellate Courts, notwithstanding the sixth, have rather uniformly held to an "indictment standard" in looking to "plea bargain agreements."

Recently, the Fifth Circuit in *U.S.A. v. Shanahan*, 574 F.2d 1228 (1978) stated:

> "Once again we are faced with another 'broken pre-plea agreement', which unfortunately seems to be a pattern of practice engaged in by some United States Attorneys' offices.



. . .

In 1935, the Supreme Court aptly pointed out the United States Attorneys' obligations which still hold true today:

> 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Berger v. United States, 295 U.S. 78, 88, 55, S.Ct. 629, 633, 79 L. Ed 1314, 1321 (1935).' "

The "plea bargain" upon which John Angus relied, and was understood by Federal Law Enforcement Agents to be his understanding and which induced his plea of guilty, should be specifically enforced and probation decreed.

## CONCLUSION

John Angus understood, as did his trial attorney, that a plea bargain understanding had been reached which would insure him his continued freedom, albeit under probation.

The Court refused to give him an evidentiary hearing. This was error of constitutional dimensions.

The Court should have granted John Angus the option after hearing of vacating the plea or granting specific performance.

The trial Court did not give John Angus this option. For this failure the within Petition for Writ of Certiorari should be granted.

Petitioner, John Angus respectfully prays that this Court vacate and remand with directions to the trial Court to hold an evidentiary hearing. And if it should find that John Angus entered his plea on the inducement that he was to be given probation, then the same should be imposed.

Respectfully submitted,

OF COUNSEL:

Stephen M. Taylor, Esq.
3000 Town Center, Suite 3131
Southfield, Michigan 48075
(313) 358-3590

Robert Eugene Smith, Esq.
1409 Peachtree St., N.E.
Atlanta, Georgia 30309
(404) 892-8890

*Attorney for Petitioner*



## APPENDIX "A"
## NO. 78-5039

## UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | : | |
| | : | |
| Plaintiff-Appellee, | : | |
| | : | |
| v. | : | ORDER |
| | : | |
| JOHN ANGUS, | : | |
| | : | |
| Defendant-Appellant. | : | |

Before PHILLIPS, Chief Judge, WEICK, Circuit Judge, and LAWRENCE, Senior District Judge.*

John Angus appeals from his conviction in the United States District Court for the Eastern District of Michigan, on a guilty plea under an indictment charging conspiracy to possess heroin with intent to sell, in violation of 21 U.S.C. § 841.

Angus entered two pleas of guilty. He contends that the second guilty plea should be set aside and that an alleged plea agreement in connection with his first guilty plea[1] should be specifically enforced. He charges ineffective assistance of counsel, prosecutorial misconduct and abuse of judicial discretion, which

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[1] The first guilty plea was later withdrawn.

*Honorable Alexander A. Lawrence, Senior Judge, U. S. District Court for the Southern District of Georgia, sitting by designation.

he says deprived him of any chance of a fair trial. He further contends that he was deprived of a speedy trial and full disclosure of complete information relative to the preparation of his presentence report.

With respect to the alleged plea agreement, District Judge Philip Pratt made the following finding:

> A review and analysis of the testimony as to the negotiations leading up to the offering of a plea in this court convinces this Court that there was in fact no actual plea agreement made. To put it in terms of context, I don't see that there was any meeting of the minds as to what the terms and conditions of the agreement actually were. Almost every witness who has testified with respect to those negotiations, has a different version of the agreement.

The record demonstrates that this finding of the district court is not clearly erroneous, but to the contrary, it is fully supported by the transcript. In essence, appellant seeks specific performance of a plea bargaining agreement which was never consumated.

All contentions made on the briefs and oral argument having been considered fully and found to be without merit, it is ORDERED that the judgment of the district court be and hereby is affirmed.



Entered by order of the court.

/s/_____
John P. Hehman, Clerk

FILED
OCT 18, 1978
JOHN P. HEHMAN, Clerk

**APPENDIX "B"**
**NO. 78-5039**

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | : | |
| | : | |
| Plaintiff-Appellee, | : | |
| | : | |
| v. | : | ORDER DENYING |
| | : | PETITION FOR |
| JOHN ANGUS, | : | REHEARING |
| | : | |
| Defendant-Appellant. | : | |

Before PHILLIPS, Chief Judge, WEICK, Circuit Judge, and LAWRENCE, Senior District Judge.*

Upon consideration, the court concludes that the petition for rehearing is without merit. The findings of the district court are supported by the record. Therefore, it is not necessary to remand the case for an evidentiary hearing.

Accordingly, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/_____
John P. Hehman, Clerk

*Honorable Alexander A. Lawrence, Senior Judge, United States District Court for the Southern District of Georgia, sitting by designation.

FILED
NOV 24, 1978
JOHN P. HEHMAN, Clerk



## APPENDIX "C"

**SUPREME COURT OF THE UNITED STATES**
**NO. A-543**

JOHN ANGUS,
Petitioner,

v.

UNITED STATES

---

**ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI**

---

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 23, 1979.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 11th day of
December, 1978.

**APPENDIX "D"**

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

v. No. 5-81838

JOHN ANGUS,
Defendant.

---

Proceedings had before the HONORABLE PHILIP PRATT, United States District Judge, at Detroit, Michigan, June 16, 1976.

---

APPEARANCES:

BRIAN MC CORMICK
Assistant United States Attorney
Appearing on behalf of the Plaintiff

SHELDON HALPERN
Appearing on behalf of the Defendant

Roy Luxton
Court Reporter



(T. 2) Detroit, Michigan
June 16, 1976

PROCEEDINGS

THE CLERK: Case number 5-81838, United States of America versus John Angus.

MR. HALPERN: For the defendant, your Honor.

THE COURT: The record should indicate that the Court is conducting an evidentiary hearing at the request of the defendant here, contained in his motion to withdraw a plea of guilty prior to sentence.

All right, Mr. Halpern, suppose you begin.

MR. MC CORMICK: Your Honor, perhaps I should begin in this particular matter.

The Court has before it, I believe, the Government's response to the defendant's allegations. It is our position at this time, your Honor, that we would concur with the defendant that the plea in fact should be withdrawn.

I would also like to emphasize the fact that the Government does not admit any prosecutorial misconduct in concurring in the matter - - or, I should say the purpose of the motion.

It is our position, though, that there is a sufficient indication in our proofs and, I believe, (T. 3) the defendant's proofs, to show ineffective assistance of counsel. And we believe that this could very well be grounds for the Court to allow the defendant to withdraw the plea of guilty. For that purpose, we do not oppose it.

THE COURT: Mr. Halpern, would you like to respond to that?

MR. HALPERN: Yes. Your Honor, the grounds alleged for the motion to withdraw the motion are three. The Prosecution has come up and not only has the Prosecution indicated its position that it has no objection, apparently, to the plea being withdrawn for whatever effect that may have on the Court's decision, the Prosecution has gone even further and has given, in fact, an opinion; the opinion being that there was no prosecutorial misconduct and that there was sufficient indication to show ineffective assistance of counsel. I think that such a conclusion on the part of the Prosecution is, at the very least, presumptuous.

We are prepared to proceed with the hearing at this time. And if the Court deems that the Prosecution's concurrence is sufficient for it to draw the conclusion that the motion to withdraw the plea be granted, then we nevertheless would at this time respectfully ask that the motion that is being made - - that is, the motion to withdraw the plea - - be considered by the Court as a motion to enforce an agreement; and we would ask that the hearing go forth under that motion, (T. 4) in place and stead of the motion to withdraw the plea.

MR. MC CORMICK: Your Honor, probably, maybe I should state our position a little stronger.

We join with the defendant in his motion at this time. I don't see any real reason for any hearing at this time, based upon the purpose of the motion.

I don't understand Mr. Halpern's new tactic to move to enforce an agreement that the Court has before it certain papers that Mr. Halpern says is unenforceable in the first instance because of the fact that the plea was taken involuntarily. Is



Mr. Halpern saying now that that plea was not taken involuntarily? I really don't understand.

I might add, your Honor, as the Court is aware from the pleadings, the defendant in this case was and has been an informant for several law enforcement agencies. And I would like to put on the record, also, the fact that the FBI, Secret Service and Drug Enforcement Administration have been advised by our Office that they shall no longer deal with this defendant in an informant capacity.

MR. HALPERN: Your Honor, I don't understand the basis for this. I really feel badly in interrupting, but I think this is not a matter of proofs that is being taken now.

THE COURT: I wouldn't think so, either.

(T. 5) It appears to the Court that regardless of which basis or ground is used - - there being several alleged in the petition - - that one is certainly sufficient to permit the withdrawal of the plea.

Insofar as the alleged promise is concerned and an attempt to enforce that promise, that would seem to me to be the type of promise contemplated by Rule 11, which is within the discretion of the Court anyway. So that it would seem that that would be an exercise in futility here.

Based on the concession of the Government here, and at least one of the gounds having been satisfied, the Court will grant the motion and permit the withdrawal of the plea.

MR. HALPERN: On what ground, your Honor?

THE COURT: On the concession made by the Government here that there is ineffective assistance of counsel.

MR. HALPERN: Well, that being the case, it being my motion - - that is, the defense motion - - we withdraw that as a ground.

What does the Government say to that?

The Government talks in terms, your Honor, of tactic. Yet, through all this time and through (T. 6) advising this Court and myself that it was working on a brief, it comes up with candidly what appears to be the most candid type of brief possible and, yet, I just get served with it the other day.

In addition to that, the Government comes in here on the date of this hearing and instead of having some kind of courtesy of at least contacting my office concerning the witnesses who are on call for this hearing, it becomes some sort of tactic of theirs to say that, "We agree that there was ineffective assistance of counsel." Well, we withdraw that as a ground, it being our motion, and we would like to proceed on the other two grounds.

THE COURT: Well, I am not going to play games, Counsel. I am permitting your withdrawal of the plea. I don't see that there is any violation of any rights whatsoever; but, on the contrary, enforcing the right of the defendant here to go to trial if he wishes to do so.

I will grant the motion and set the matter down for trial.

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CERTIFICATION

STATE OF MICHIGAN )
) SS
COUNTY OF WAYNE )

I, Roy Luxton, Official Court Reporter, hereby certify that the foregoing transcript is a true and correct transcription of my stenotype notes taken in the matter of the United States of America versus John Angus, before the HONORABLE PHILIP PRATT, United States District Judge, at Detroit, Michigan, June 16, 1976.

/s/ Roy Luxton
Roy Luxton
Official Court Reporter
United States District Court
Eastern District of Michigan

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Supreme Court, U. S.
FILED
MAR 26 1979
JR., CLERK

No. 78-1153

# In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN ANGUS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

SIDNEY M. GLAZER
KAREN A. REBROVICH
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINION BELOW

The order of the court of appeals (Pet. App. A.1-A.3) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on October 18, 1978. A petition for rehearing was denied on November 24, 1978. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including January 23, 1979, and the petition was filed on January 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the record supports the district court's finding that the parties had never concluded a plea agreement.

## STATEMENT

On September 8, 1977, petitioner pleaded guilty in the United States District Court for the Eastern District of Michigan to one count charging conspiracy to possess heroin with intent to distribute it, in violation of 21 U.S.C. 841. He was sentenced to six years' imprisonment and three years' special parole. The court of appeals affirmed (Pet. App. A.1-A.2).

1. Petitioner entered his first guilty plea to this charge (the first count of a 31-count indictment) on December 23, 1975 (I Tr. 1-14).[1] At the Rule 11 hearing, the prosecutor and defense counsel informed the court that, in exchange for petitioner's plea of guilty to one count of the indictment, the government had agreed to dismiss the remaining counts and to refrain from seeking additional charges against petitioner (I Tr. 2-3). Thereafter, prior to sentencing petitioner obtained new counsel and moved the district court to withdraw his plea of guilty on the grounds of prosecutorial misconduct and ineffective assistance of counsel. At the outset of the hearing on this motion, the prosecutor stated that because there were sufficient indications that petitioner's guilty plea had resulted from ineffective assistance of counsel, the government did not oppose the withdrawal of the guilty plea (II Tr. 2-3). Defense counsel then requested that the court consider the motion to withdraw the plea as a motion to specifically enforce an alleged agreement he contended had been breached by the government (II Tr. 3, 5). The court granted petitioner's motion to withdraw the guilty plea but denied his oral motion for either

[1] "I Tr." refers to the December 23, 1975, Rule 11 hearing on petitioner's first guilty plea, "II Tr." to the June 16, 1976, hearing on petitioner's motion to withdraw his guilty plea, "III Tr." to the September 6 and 7, 1977, suppression hearing, and "IV Tr." to the September 7 and 8, 1977, Rule 11 hearing on petitioner's second guilty plea.



specific performance of the alleged agreement or for an evidentiary hearing to determine if the alleged plea agreement had been breached (II Tr. 5-6).

Thereafter, at a pretrial suppression hearing held September 6, 1977, to determine the admissibility of statements petitioner made to the government prior to the withdrawal of his plea, the district court heard testimony regarding the out-of-court negotiations that led to the entry of petitioner's December 23 guilty plea. The crucial negotiations took place in a hurried fashion in a hallway outside the courtroom where the district court had scheduled a hearing on the government's motion to revoke petitioner's bond (III Tr. 19-20, 68-69).

The Assistant United States Attorney who represented the government in these negotiations testified that he had told defense counsel that, in exchange for petitioner's guilty plea on the first count of the indictment, the government would agree to dismiss the remaining counts and not to seek a second indictment charging petitioner with conducting a criminal enterprise (III Tr. 66). The prosecutor also stated that petitioner had agreed to cooperate with the government (III Tr. 67). The prosecutor denied that he had ever indicated that the government would recommend probation, or indeed make any sentencing recommendation, although he stated that he had agreed that any cooperation by petitioner would be made known to the sentencing court (III Tr. 68).

Thomas Howard, who had been petitioner's counsel at the time of these negotiations, testified that he could not recall the details of his conversation with the prosecutor; but he stated that it was his understanding that the government had agreed, if petitioner provided evidence of a number of serious narcotics violations,[2] that petitioner

[2] Petitioner's counsel stated these were to be "Class A" cases (III Tr. 25). DEA classifies cases according to seriousness, and Class

would be placed on probation—"subject, of course, to the approval of the Court" (III Tr. 24-25). Petitioner testified that Mr. Howard had told him that he would receive probation if he made "three deals" for the government (III Tr. 128-129).[3]

Agent Seward, who was also present during the negotiations, testified that it was his understanding that the agreement was that petitioner would plead guilty to one count, his bond would be continued, and he would cooperate with the government (III Tr. 45). He added that defense counsel had pressed for an agreement that if petitioner provided evidence in three or five narcotics cases the government would make a recommendation to the court for probation (III Tr. 46). Finally, Seward stated that so far as he knew the prosecutor had not agreed that if petitioner furnished information regarding a certain number of cases the government would recommend probation (III Tr. 57).[4]

At the conclusion of the hearing the district court made the following findings (III Tr. 171-172, 176):

> A review and analysis of the testimony as to the negotiations leading up to the offering of a plea in this court convinces this Court that there was in fact no actual plea agreement made. To put it in terms of context, I don't see that there was any meeting of the

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A (or Class One) cases are the most serious (III Tr. 104). Counsel stated that he was not certain how many cases were agreed upon; he thought it was five, but knew petitioner believed it was three (III Tr. 25).

[3]FBI Agent William Bolton testified that he had overheard defense counsel tell petitioner that if petitioner were able to give federal officials evidence of Class A violations, his sentence might be reduced by five years for each such case (III Tr. 104).

[4]However, Seward later stated (III Tr. 63): "There was a deal in my mind, that if [petitioner] pled guilty and performed, that the Government would make a recommendation for probation."



minds as to what the terms and conditions of the agreement actually were. Almost every witness who has testified with respect to those negotiations, has a different version of the agreement—everywhere from the testimony of the defendant that he understood the plea agreement to be that for every Class A deal that he provided or assisted the DEA on, five years would be knocked off the fifteen-year maximum that he was facing, to the testimony of the Assistant United States Attorney that if he cooperated with the Government, that his cooperation would be made known to the sentencing judge. In between, we have the testimony of the DEA agent who testified that that would include even recommending probation, and the testimony of counsel for the defendant, which I find to be equivocal, as to whether there was to be probation or whether he was to be out on the street or would merely be a recommendation of probation.

* * * * *

Since I have found that there never was a plea bargain as such, then, certainly, specific performance of it cannot be ordered. I don't think that there is any showing here that there was any prosecutorial misconduct that would permit the Court to dismiss the matter.

The real gist of the matter, I think, is that because there were attempts on the part of Defense Counsel to obtain the best deal that could be made available, and the willingness of the defendant to negotiate in any way to avoid a possible jail sentence, and because of the circumstances surrounding the time that the negotiations were actually entered into, that not enough time was taken to be specific to provide the details and to advise the Court fully of the agreement.

> And in that area, certainly, I cannot fault the Government or find that its conduct was impermissible.

On September 8, 1977, petitioner again pled guilty to a violation of 21 U.S.C. 841 in exchange for dismissal of the remaining counts of the indictment.[5] The court of appeals affirmed (Pet. App. A.1-A.2), rejecting petitioner's contention that the district court had erred in setting aside petitioner's first plea instead of enforcing the alleged agreement that he be placed on probation.

**ARGUMENT**

Petitioner's basic legal claim—that he was entitled to specific performance of a plea bargain under which he was allegedly promised that he would receive a sentence of probation—depends at the outset upon the existence of a bargain to that effect. The factual question whether any such bargain existed was resolved adversely to petitioner by the district court, whose findings were sustained by the court of appeals, and there is no occasion for further review of these findings by this Court. *Berenyi* v. *Immigration Director,* 385 U.S. 630 (1967).[6]

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[5]The government agreed (IV Tr. 14) not to oppose an appeal by petitioner on any jurisdictional defects, and stated that it would defer dismissing the remaining counts of the indictment until the appeal was decided. At the Rule 11 hearing, the court explained to petitioner that the plea agreement provided that if petitioner subsequently disclosed information leading to the apprehension of persons responsible for certain Oakland County kidnap-murders, the government would not oppose withdrawal of the new guilty plea, and would at that time recommend that petitioner be placed on probation (IV Tr. 25-26).

[6]Petitioner's contention (Pet. 5-11) that he was denied an evidentiary hearing on the question of specific performance of the agreement is not supported by the record. As we have shown, the district court heard testimony at the pretrial suppression hearing on September 6, 1977, from the five individuals who were present at the plea negotiations, considered the testimony of each witness (III Tr. 171-172), and concluded that no agreement had been reached (III Tr. 171). The district court heard all the evidence petitioner proffered at that time, and petitioner has not identified any relevant evidence that was not considered by that court.



Petitioner seeks to introduce a legal issue by contending (Pet. 12) that the courts below held his plea bargain was not enforceable because it was not "fully spread on the record" and "reduced to writing." The courts below did not, however, rely on any technical defect to deny enforcement of a plea agreement. To the contrary, the district court found, as a matter of fact, that in their haste to conclude a plea bargain the parties had failed to reach complete agreement on the terms of the bargain. The court found (III Tr. 171) that there was never any "meeting of the minds," and thus no agreement that could be enforced.

The court of appeals correctly concluded (Pet. App. A.2) that the record amply supports the district court's finding: each witness had a different understanding of the plea "agreement."[7] Even the testimony of Mr. Howard, petitioner's counsel during these negotiations, supports the finding that no agreement ever jelled; he stated (III Tr. 38) that although he understood petitioner would be "[o]n the street" if he provided evidence in the requisite number of cases, there was no discussion of "the means by which he would accomplish that objective."[8]

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[7]Indeed, petitioner's counsel emphasized this very point in his argument to the trial court; he pointed out that there had been testimony describing at least three distinctly different agreements (III Tr. 158-159).

[8]We note, finally, that since the prosecutor has no power to commit the court to impose a sentence of probation (see Fed. R. Crim. P. 11(e)(1)), there is no legal basis for specifically enforcing any such *ultra vires* promise. If a defendant's plea was induced by such a promise, the remedy is to set aside the plea. See *United States* v. *Hammerman,* 528 F. 2d 326 (4th Cir. 1975).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

SIDNEY M. GLAZER
KAREN A. REBROVICH
*Attorneys*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1153

JOHN ANGUS,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

REPLY BRIEF TO BRIEF FILED FOR THE UNITED STATES IN OPPOSITION

OF COUNSEL:

STEPHEN M. TAYLOR, ESQ.
3000 Town Center, Suite 3131
Southfield, Michigan 48075
(313) 358-3590

ROBERT EUGENE SMITH, ESQ.
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890

*Attorney for Petitioner*

The Paul M. Harrod Company, Baltimore, Maryland 21234

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## ARGUMENT

THE SOLICITOR GENERAL, IN OPPOSITION TO THE PETITION FOR CERTIORARI FILED ON BEHALF OF JOHN ANGUS, HAS ATTEMPTED TO SIMPLIFY THE ISSUES PRESENTED BY SAID PETITION BY REDUCING THE TWO QUESTIONS PRESENTED TO ONE. WHEREUPON THE SOLICITOR GENERAL'S BRIEF GOES ON TO ARGUE AGAINST THE PROPOSITION SUGGESTED BY THEIR BRIEF IRRESPECTIVE OF THE QUESTION PRESENTED, AND THEIR CONCLUSIONS PREDICATED THEREUPON, WE SUGGEST, ARE ERRONEOUS.

The questions presented by the original Petition for Certiorari are two in nature.

1. Does the denial by the trial judge of an Evidentiary Hearing on Petitioner's demand for specific performance under the *Santobello* [404 U.S. 257] rationale constitute a deprivation of Petitioner's rights to due process under the *Fifth Amendment* to the *Constitution of the United States* as well as also failing to promote the policy of this Court in the sound administration of justice?

2. Is Petitioner entitled to specific performance of his plea bargain contract on due process grounds where he was induced to enter a plea of guilty on the basis of receiving probation, should he act as an agent for the government in various controlled substances deals or otherwise furnish evidence of ongoing criminal activity.



The government's Brief in Opposition at footnote No. 6 on page 6 suggests that the Court heard testimony at a pretrial suppression hearing on September 6, 1976 from the five (5) individuals who were present at the plea negotiations, considered the testimony of each witness, and concluded no agreement had been reached.

It is uncontroverted, and the government does not even allude to the fact that on June 16, 1976 counsel for the Petitioner requested the court to give him a hearing on the issue of specific performance and whether or not the alleged plea bargain had been reached. The judge on that date refused to grant a hearing to determine the government had breached the plea bargain agreement. Subsequent to that time, at a hearing on a collateral matter in September, the court made an observation which obviously was in the nature of dicta. It did not address itself to the hearing which the defendant had requested in June to be convened at that time.

It is further undisputed that a great deal of confusion existed with respect to the purported plea bargain which justified a full evidentiary hearing addressed to the issue of the plea bargain, not through a motion to suppress. The government's statement contained in its Brief in Opposition acknowledges the following factors that would suggest that some kind of plea bargaining understanding had ripened in the mind of the petitioner.

1. Thomas Howard, who was petitioner's counsel at the time of negotiations, testified he could not recall the details of his conversation but it was understood that the government had agreed if petitioner provided evidence of a number of serious narcotics violations, that petitioner would be placed on probation.

2. Petitioner testified that Mr. Howard, his attorney, told him that he would receive probation if he made three deals for the government.

3. Agent Seward, who was present at the negotiations, later stated that "there was a deal in my mind that if petitioner plead guilty and performed, that the government would make a recommendation for probation."

4. F.B.I. agent Bolton testified that he overheard defense counsel tell petitioner that if petitioner were able to give federal officials evidence of "Class A" violations, the sentence might be reduced by five years in each case.

Taking the facts set forth by the brief by the government in opposition, it is clear that some kind of understanding had apparently been reached which, in a amorphous fashion, suggested that defendant, petitioner herein, should he furnish three "Class A" deals, would receive probation, or at least a recommendation of probation, from the government. The failure to grant a hearing under the doctrine of *Santobello, supra*, under these circumstances, clearly establishes the deprivation of petitioner's rights to due process in connection with the supposed plea bargain understanding.

## CONCLUSION

The trial court refused to give John Angus, petitioner herein, an Evidentiary Hearing on the issue of a plea bargain and specific performance of same. This was error of constitutional dimension. The trial court should have granted John Angus the option after hearing, of vacating the plea or granting specific performance. Having failed to grant a hearing and the aforesaid option, the within Petition for Writ of Certiorari should be granted.



Petitioner, John Angus respectfully prays that this Court vacate and remand with directions to the trial Court to hold an evidentiary hearing. And if it should find that John Angus entered his plea on the inducement that he was to be given probation, then the same should be imposed.

Respectfully submitted,

Robert Eugene Smith, Esq.
1409 Peachtree St., N.E.
Atlanta, Georgia 30309
(404) 892-8890

*Attorney for Petitioner*

OF COUNSEL:

Stephen M. Taylor, Esq.
3000 Town Center, Suite 3131
Southfield, Michigan 48075
(313) 358-3590